Supreme Court, U.S.
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No. 92-1564

In The

Supreme Court of the United States

October Term, 1992

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

vs.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID M. FELDMAN
MYRA C. SCHEXNAYDER
FELDMAN & ROSENBERG, L.L.P.
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-8300

M. KARINNE McCULLOUGH
Counsel of Record
GIESSEL, STONE, BARKER & LYMAN
2700 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1063
(713) 759-1990

Attorneys for Respondent

3686
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED FOR REVIEW

Whether the Establishment Clause prohibits a school district from enacting a policy which permits student volunteers, at the election of the student class (and not school officials), to deliver nonsectarian, nonproselytizing benedictions at high school graduation exercises?

LIST OF PARTIES

Parties to the Proceedings Below:

(1) Merritt E. Jones, Plaintiff-Appellant

(2) Pamela Jones, Plaintiff-Appellant

(3) John Doe, Plaintiff-Appellant

(4) Jane Doe, Plaintiff-Appellant

(5) Clear Creek Independent School District, Defendant-Appellee

Amici Curiae in the Proceedings Below:

(1) Aldine Independent School District

(2) Alief Independent School District

(3) Alvin Independent School District

(4) Anahuac Independent School District

(5) Brazosport Independent School District

(6) Columbus Independent School District

(7) Deer Park Independent School District

(8) East Chambers Independent School District

(9) Humble Independent School District

(10) Katy Independent School District

(11) Klein Independent School District

(12) Rice Consolidated Independent School District

(13) Spring Independent School District

(14) Waller Independent School District

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No. 92-1564

In The

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MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

vs.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Clear Creek Independent School District respectfully requests that the Petition for Writ of Certiorari filed by Petitioners Merritt Jones, Pamela Jones, John Doe, and Jane Doe ("Petitioners") be dismissed on the grounds that it was untimely filed. Alternatively, Respondent requests that the Petition be denied since the Fifth Circuit's opinion below is not in conflict

with this Court's opinion in *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

STATEMENT OF JURISDICTION AND MOTION TO DISMISS

The Fifth Circuit Court of Appeals rendered its initial opinion in *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1991), on April 18, 1991, affirming the district court's order granting summary judgment in favor of Respondent Clear Creek Independent School District. This Court subsequently vacated the Fifth Circuit's opinion and remanded the case for consideration in light of *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

On November 24, 1992, the Court of Appeals for the Fifth Circuit once again affirmed the district court's judgment in favor of Respondent. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) ("*Jones II*"). Thereafter, Petitioners filed a Petition for Rehearing *En Banc*, requesting reconsideration of the panel opinion by the full court. *See* Appendix A. The Court of Appeals overruled the Petition for Rehearing *En Banc* on December 28, 1992. *See* Appendix B.

On March 25, 1993 — approximately 120 days after the Fifth Circuit issued its opinion in *Jones II* — Petitioners filed their Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion. Petitioners have taken the position that their Petition for Rehearing *En Banc* constitutes a motion for panel rehearing for the purpose of tolling the ninety days within which a party may file a petition for writ of certiorari.[1] Supreme Court Rule 13.4, however,

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1. Petitioners have taken this position regardless of the plain language contained in their Petition for Rehearing *En Banc* wherein counsel for Petitioner states that "consideration by the full court is necessary to secure and maintain uniformity of decisions in this court." *See* Appendix A at p. 4a.

expressly provides that "[a] suggestion . . . for rehearing en banc . . . is not a petition for rehearing." Thus, the *Jones'* Petition for Writ of Certiorari is untimely because it was filed more than ninety days after the November 24, 1992, entry of the judgment that Petitioners seek to have reviewed. Respondent respectfully moves, therefore, for an order dismissing the Petition for Writ of Certiorari because it is untimely. In the alternative, Respondent opposes a grant of certiorari for the reasons set forth below.

STATEMENT OF THE CASE

Petitioner Merritt Jones is the father of Petitioner Pamela Jones. Pamela is a 1987 graduate of Clear Lake High School. Petitioner John Doe is the father of Petitioner Jane Doe. Jane is a 1988 graduate of Clear Lake High School. Clear Creek Independent School District is a duly constituted body politic with powers and jurisdiction pursuant to Texas law.

On May 11, 1987, Petitioners brought suit to enjoin Respondent from allowing prayers to be delivered at its high school graduation ceremonies. In particular, Petitioners complained of the invocation and benediction presented during the 1986 Clear Lake High School graduation ceremonies.[2]

Invocation

> Lord,
>
> Thank you for allowing us to obtain this milestone in our lives. Help us always to remember your great kindness and love

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2. The parties dispute the exact wording of the invocation and benediction. Respondent's version is based on a videotape of the ceremony which was submitted as part of its summary judgment proof. The differences in the two versions, however, are generally minor.

whenever something great is accomplished in our lives. Some say high school years are a very painful, growing time. Undoubtedly, the many defeats, the disappointments, and mishaps that have occurred over the last four years would suggest this and even back it up. Yet when we take the time in the future to uncover our high school years in the vaults of our memories, the victories against all odds, the successes when defeat was imminent, and the friendships that will never, ever end will all shine through with a brilliant radiance of happiness that will only become more meaningful and beautiful as the years pass us by. Thankfully, nothing short of your awesome will and power will ever eclipse these great visions and memories. It is these unequivocal times that we are here to commemorate this afternoon. [Sentence unintelligible] Just bless and keep each of us over the years, until someday we all meet again. Amen.

Benediction

Let us pray.

Dear Lord,

As we emerge from a secluded high school please inspire us to greater heights and greater glories [unintelligible]. Instill in our spirit a sense of decency and pride. Inspire us to face all our challenges with confidence and turn obstacles into stepping stones to success. Let us look towards the future. Amen.

Petitioners have not complained of any invocations or benedictions since those delivered at the 1986 graduation ceremonies. In fact, Petitioners have admitted that both the invocation and benediction delivered at the 1987 ceremony were within constitutional parameters.

On December 15, 1987, Respondent adopted a resolution ("the Resolution"), formalizing its previously unwritten policy and practice, permitting the inclusion of invocations and benedictions at high school graduation exercises. The Resolution specifically provides that student volunteers may present nonsectarian, nonproselytizing invocations and/or benedictions at the discretion of the senior class.

On January 19, 1988, Respondent filed a Motion for Summary Judgment based on case law and the Respondent's Resolution. The district court concluded that Petitioner's suit no longer presented a justiciable controversy and, further, that Respondent was entitled to summary judgment as a matter of law.

REASON FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *LEE V. WEISMAN* SINCE THE CASES ARE FACTUALLY AND, THEREFORE, LEGALLY DISTINGUISHABLE.

Petitioners erroneously assert that "[t]his case raises the same questions the Court answered in *Lee v. Weisman*" Petition at p. 9 (citation omitted). There, according to Petitioners, this Court concluded that "a religious exercise may not be conducted at a graduation ceremony." Petition at p. 9.

In fact, the *Lee* opinion does not announce a per se ban on the inclusion of prayer in graduation exercises. Rather, this Court's opinion repeatedly emphasizes that the Establishment Clause *prohibits clergy-delivered prayer* that is *initiated and directed by the state*. Since the Resolution at issue before this Court does not provide for state-initiated or state-directed prayer of any sort, the Fifth Circuit's analysis was not constrained by the *Lee* holding and, thus, the decision in *Jones II* does not conflict with *Lee*.

A. This Court's Holding in *Lee v. Weisman* Is Limited to the Facts of that Case.

Contrary to what Petitioners suggest, *Lee v. Weisman*, 112 S. Ct. 2649 (1992), does not announce an inflexible prohibition on all religious expression in school-related activities. In the *Lee* opinion, this Court emphasized that Establishment Clause jurisprudence is an area of "line drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." *Id.* at 2661. Indeed, this Court expressly stated that its holding should be limited to the particular facts set forth in *Lee*:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as unreligious messages, but offense alone does not in every case show a violation. We know, too, that sometimes to endure social isolation or even anger may be the price of conscience or conformity. But, by any reading of our cases, the conformity required of the student *in this case* was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises *in this case* are especially improper because the State has in every practical sense compelled attendance and participation in an

> explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 2661 (emphasis added).

Invocations and benedictions delivered at school-related activities and ceremonies are not — as Petitioners contend — inherently unconstitutional. Rather, the *Lee* opinion clarifies that it was the significant degree of "state involvement" in the preparation and delivery of the benediction and invocation that rendered that particular prayer unconstitutional.

> A school official, the principal, decided that an invocation and benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a statute decreed that the prayer must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State.
>
> The State's role did not end with the decision to include a prayer and with the choice of clergyman. [The principal] provided [the rabbi] with a copy of . . . [a pamphlet prepared by the National Conference of Christians and Jews entitled] "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayer.

Id. at 2655-56. From those facts, this Court concluded that the

"degree of school involvement . . . made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 2657.

B. *Jones* Is Factually Distinguishable from *Lee v. Weisman*.

Petitioners erroneously maintain that Respondent's Resolution "is not materially different from Providence's prohibited policy." Petition at p. 10. Notwithstanding Petitioners' characterization of the facts and Resolution at issue here, *Lee* is distinguishable in at least four very important respects.

First, unlike the prayers at issue in *Lee*, the benedictions and invocations delivered at Clear Creek Independent School District ("CCISD") high school graduation ceremonies are student generated, rather than the product of significant state involvement. The CCISD Resolution expressly provides that the use of an invocation and/or benediction at high school graduation exercises "shall rest within the discretion of the graduating senior class. . . ." *See* Appendix C. Second, the CCISD Resolution provides that the invocation and benediction, *if used*, shall be written and delivered by a student volunteer, as opposed to a member of the clergy. *Id.* Student volunteers, unlike members of the clergy, are not clothed with the indicia of religion.

Third, the students who participate in CCISD graduation exercises are high school seniors, normally eighteen years of age and adults in the eyes of the law, whereas the students who attended the promotion exercises in *Lee* were adolescents, primarily fourteen years old.[3] Fourth, CCISD high school graduation

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3. While this Court addressed both middle school and high school graduations, the evidence presented in *Lee* primarily pertained to middle school "promotional exercises." In fact, this Court took special note of the distinction between "mature adults" and "primary and secondary school children . . . [who] are often susceptible to pressure from their peers towards conformity." *Lee*, 112 S. Ct. at 2658-59.

ceremonies are traditionally conducted off campus. The promotion exercises in *Lee*, on the other hand, were conducted on school premises.

Petitioners argue in their Petition (as they did in the court below) that the above-referenced factors do not set this case apart from *Lee*. If anything, Petitioners argue, the CCISD Resolution is "more likely to be perceived as constituting a governmental endorsement of religion" than the policy and practice at issue in *Lee*. Petition at p. 17. Petitioners' position, however, completely ignores the thrust of this Court's opinion. The gravamen of the *Lee* opinion is the prohibition of *state* involvement in religious exercises. Nowhere in the opinion does the Court even begin to address prayer which is prepared and delivered outside the aegis of the state. In fact, a careful review shows that this Court took great pains to narrowly tailor the question presented in *Lee*, *i.e.*, "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment?" *Lee*, 112 S. Ct. at 2652. Likewise, the Court took great pains to narrowly tailor the reach of its holding: "These dominant facts *mark and control the confines of our decision:* State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 2655 (emphasis added).

In light of the factual distinctions addressed above, *Jones II* and *Lee* are not in conflict and, thus, the Petition for Writ of Certiorari should be denied.[4]

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4. Although they have not couched the issue as an independent ground for granting review, Petitioners have, nevertheless, taken the Fifth Circuit to task for applying the so-called "endorsement" and "coercion" methods of analysis, in addition to the traditional three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, Petition at p. 12. The Fifth Circuit's reference to alternate methods of analyzing Petitioners' Establishment Clause claims does not, however, justify Supreme Court review. The only issue here is whether the Fifth Circuit's decision is in conflict with *Lee*.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari should be dismissed for want of jurisdiction or, alternatively, denied.

Respectfully submitted,

M. KARINNE McCULLOUGH
Counsel of Record
GIESSEL, STONE, BARKER
& LYMAN
2700 Two Houston Center
909 Fannin Street
Houston, Texas 77010-1063
(713) 759-1990

DAVID M. FELDMAN
MYRA C. SCHEXNAYDER
FELDMAN & ROSENBERG, L.L.P.
12 Greenway Plaza, Suite 1202
Houston, Texas 77046
(713) 960-8300

Attorneys for Respondent

APPENDIX A — APPELLANTS' PETITION FOR REHEARING EN BANC DATED DECEMBER 7, 1992

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel hereby certifies that the following list of persons has an interest in the outcome of this case:

A. Plaintiffs below and appellants here are:

Merritt E. Jones
Pamela Jones
John Doe
Jane Doe

B. Defendant below and appellee here is:

Clear Creek ISD[1]

C. *Amici Curiae* in support of appellee (upon remand from the Supreme Court) are:

Aldine ISD
Alief ISD
Alvin ISD
Anahuac ISD
Brazosport ISD
Columbus ISD
Deer Park ISD
East Chambers County Consolidated ISD
Humble ISD

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1 "ISD" is used throughout this pleading as an abbreviation for "Independent School District." All of the school districts listed in this certificate of interested persons are Texas school districts located in the Southern District of Texas.

Appendix A

Katy ISD
Klein ISD
Rice Consolidated ISD
Spring ISD
Waller ISD

D. The following attorneys represent the parties and *amici.*

1. Appellants' attorneys:

Bruce V. Griffiths, 1019 Congress, Suite 1550, Houston, Texas 77002-1702;

Mitchell A. Seider, 3700 First City Tower, Houston, Texas 77002.

2. Appellee's attorneys:

M. Karinne McCullough, GIESSEL, STONE, BARKER & LYMAN, 909 Fannin, Suite 2700, Houston, Texas.

3. Attorneys for *Amici Curiae:*

David M. Feldman, VINSON & ELKINS, 2837 First City Tower, Houston, Texas 77002-6760;

Myra C. Schexnayder, VINSON & ELKINS, 2837 First City Tower, Houston, Texas 77002-6760;

Kelly Frels, BRACEWELL & PATTERSON, 2900 South Tower Pennzoil Place, Houston, Texas 77002;

Appendix A

John David Thompson, BRACEWELL & PATTERSON, 2900 South Tower Pennzoil Place, Houston, Texas 77002;

Janet L. Horton, BRACEWELL & PATTERSON, 2900 South Tower Pennzoil Place, Houston, Texas 77002.

/S/
Bruce V. Griffiths

Appendix A

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions of this Court:

Lee v. Weisman, 112 S.Ct. 2649 (1992).

I express a belief, based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

> 1. Does the fact that a prayer included in the program at a public high school graduation ceremony is delivered by a graduating senior rather than a clergyman take the practice outside the holding of *Lee v. Weisman*, 112 S.Ct. 2649 (1992), that such prayers violate the Establishment Clause of the First Amendment?
>
> 2. May the Court of Appeals affirm a summary judgment that was granted three years before the Supeme Court announced the applicable legal standard without allowing the party against whom summary judgment was granted the opportunity to produce evidence relevant to the new standard?

/S/_____
Bruce V. Griffiths
Attorney of Record for Appellants

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STATEMENT OF THE ISSUES

I. **THE RULE OF *LEE V. WEISMAN* PROHIBITS THE INCLUSION OF PRAYERS IN PUBLIC HIGH SCHOOL GRADUATION CEREMONIES EVEN IF THE PRAYERS ARE DELIVERED BY GRADUATING SENIORS RATHER THAN CLERGYMEN.**

II. **THE SUPREME COURT'S DECISION IN *LEE V. WEISMAN* REQUIRES, AT LEAST, THAT THIS CASE BE REMANDED TO THE DISTRICT COURT SO THAT THE COURT MAY APPLY THE FACTS OF THIS CASE TO THE NEWLY ANNOUNCED LEGAL STANDARD.**

STATEMENT OF THE CASE

i. Statement of the Course of proceedings and disposition of the case.

This case arises out a lawsuit filed in the spring of 1987 by Merritt Jones and his daughter, Pamela Jones, then a senior at Clear Lake High School, a public high school near Houston, Texas. The Joneses[2] objected to and sought to enjoin the Clear Creek Independent School District's practice of having members of the graduating class deliver prayers at the high school's graduation ceremony. Approximately six weeks before the case was to be tried, the defendant school district adopted a formal resolution governing invocations at its graduation exercises, and, a few weeks later, moved for summary judgment on the basis that its

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2. The Joneses were, during the pendency of the action, joined by another father and daughter who proceeded under the pseudonym of "John Doe" and Jane Doe." All four plaintiffs are hereafter referred to as "Jones."

policy, as set out in the school district resolution, was constitutional. The trial court canceled the trial setting and, 16 months later, granted the summary judgment for the school district.

Jones appealed and this Court affirmed, *Jones v. Clear Creek I.S.D.*, 930 F.2d 416 (5th Cir. 1991). Jones' suggestion for rehearing was denied and the plaintiffs applied to the United States Supreme Court for writ of *certiorari*. On June 29, 1992, the Supreme Court entered a brief order granting Jones' petition, vacating the judgment of this Court, and remanding for consideration in light of *Lee v. Weisman*, 112 S.Ct. 2649 (1992), which had been decided five days earlier.

On November 24, 1992, a panel of this Court issued an opinion, distinguishing the facts of this case from those of *Lee* and again upholding the judgment of the district court. In response to that decision, Jones files this petition for rehearing *en banc*.

ii. Statement of the Facts

For many years, it has been the practice at Clear Lake High School[3] for the high school graduation ceremony to include public prayers ("invocations" and "benedictions") delivered by members of the senior class. In 1986, Merritt Jones learned of this practice while attending the graduation exercise for his son. The following year, the year of his daughter Pamela's graduation, Jones contacted school officials and requested that the 1987 ceremonies not include prayers on the grounds that such religious activities by a public school district had the effect of endorsing religion and thus

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3. Clear Lake High School is one of two high schools operated by appellee Clear Creek ISD.

violated the Establishment Clause of the First Amendment. When school officials refused to modify their policy, Merritt and Pamela Jones brought this action, seeking a temporary injunction barring the district from including prayers in the 1987 graduation ceremony. Jones withdrew his request for a preliminary injunction when the district agreed to include in the 1987 ceremonies an "invocation" which included none of the traditional attributes of a prayer, i.e., it did not address a deity, it did not invoke the name of God, Jesus, or any other religious figure, and it did not close with "amen" or any similar phrase. According to his affidavit in opposition to Clear Creek's motion for summary judgment, Jones agreed to the inclusion of this invocation in the 1987 ceremony not because the invocation was "non-denominational," but because the invocation was not, by his lights, a prayer at all. (R.181).

Pre-trial discovery showed that the program of Clear Lake High School had traditionally been established by an *ad hoc* committee of senior class officers and academic honorees (valedictorians), subject to the approval of the senior class principal (a school district administrator). (R.21-25) It also showed that the graduation ceremonies were clearly official school events sponsored and paid for by the school district. District administrators annually issued detailed directives to students and parents, setting out rules of dress and deportment for these ceremonies. (R.207-210). The 1987 directive stated, "The commencement is a scheduled school activity, and school regulations shall be enforced." (R.207). There is absolutely no evidence in the record that the Clear Lake High School graduation ceremony has been or has been perceived as being a public forum in which all comers can have access to the program to speak their minds. Rather, it is clearly a school event, sponsored by the school district and subject to its control, at which a small group of officially recognized representatives of the senior class are entitled to speak.

Appendix A

On December 15, 1987, a few weeks before this case was set to be tried, the Clear Creek ISD school board adopted a resolution which, for the first time, enacted a written policy concerning graduation prayers. Its operative clauses read as follows:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and
>
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

(R.234).

Three weeks before the scheduled trial date, Clear Creek filed a motion for summary judgment with a copy of the resolution attached as the only exhibit. Jones opposed the summary judgment and sought a continuance so that he could do additional discovery on the issue of how this policy would actually be applied. (R.212-225). The question of the application of the policy was particularly problematic because the "whereas clauses" of the resolution suggested that the written policy was a codification of previous practice, while other evidence showed that in prior years the district had made no effort to enforce a requirement that the graduation prayers be nonsectarian. (R.180-183, 188-204, 21-25). The district court denied the opportunity to do additional discovery and granted the district's motion for summary judgment.

Appendix A

ARGUMENTS AND AUTHORITIES

I. THE RULE OF *LEE V. WEISMAN* PROHIBITS THE INCLUSION OF PRAYERS IN PUBLIC HIGH SCHOOL GRADUATION CEREMONIES EVEN IF THE PRAYERS ARE DELIVERED BY GRADUATING SENIORS RATHER THAN CLERGYMEN.

The district court, in its memorandum opinion granting the defendant's motion for summary judgment, acknowledged that the Supreme Court "has traditionally been highly protective of primary and secondary school students in barring patently religious activities . . .". (R.127) It distinguished the Clear Lake High School graduation exercises from these "protective" cases on seven grounds (R.128):

(1) The ceremonies were not held on the school campus;

(2) The prayers were very brief;

(3) They were only held once a year;

(4) The audience is older than the usual student body, consisting primarily of graduating seniors and their parents;

(5) The school district policy requires that prayers be nonsectarian;

(6) The prayer is delivered by a student volunteer; and

(7) Attendance at the high school graduation ceremony is not mandatory.

Appendix A

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), the Supreme Court, in holding a graduation prayer to be a violation of the Establishment Clause, expressly considered and rejected as important distinctions all but two of the factors listed in the district court's opinion. Specifically, the facts at bar differ from those in *Lee* in that the graduation in *Lee* took place on the school campus and that the prayers in question were delivered by a student rather than a clergyman.

On remand, the panel opinion of the Court of Appeals, while purporting to engage in a complex analysis of the rule of *Lee*, in fact seriously misreads that opinion and holds, essentially, that this case is different from *Lee* because students rather than a rabbi lead the prayers.[4]

Lee v. Weisman is only the latest Supreme Court decision holding that religious observances in public primary and secondary schools are particularly likely to run afoul of the Establishment Clause because the fact that school authorities exercise such extensive control over school activities means that religious activities in the public schools are highly likely to be perceived as being endorsed by school officials. In a recent, post-*Lee*, opinion, the Court of Appeals for the Sixth Circuit recognized the same point:

> Schools are not traditional public fora, and

---

4. The panel opinion also argues that student attendance was somehow more "coerced" in *Lee* than in *Jones*. (Slip Op. p.1022) This argument is difficult to understand because this Court's opinion in *Lee* holds that the fact that a student who objects to prayer at his graduation is put to the choice of listening to the prayer or not attending his high school graudation makes attendance mandatory, at least for purposes of determining the constitutionality of graduation prayers. Pamela Jones and Jane Doe, the graduating seniors in this case were put to exactly the same choice. There is no distinction between the two set of facts.

governments have much broader power over student speech than other types of private speech. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S. Ct. 562, 567, 98 L. Ed. 2d 592 (1988) (citation omitted). Moreover, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary." *Edwards v. Aguillard,* 482 U.S. 578, 583-84, 107 S. Ct. 2573, 2577, 96 L. Ed. 2d 510 (1987). "The Supreme Court has emphasized that the avoidance of religious divisiveness is nowhere more important than in public education, for 'the government's activities in this area can have a magnified impact on impressionable young minds. . . .' " *Mozert v. Hawkins County Bd. of Educ.,* 827 F.2d 1058, 1072 (6th Cir. 1987) (Kennedy, J., concurring) (quoting *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 383, 105 S. Ct. 3216, 3222, 87 L. Ed. 2d 267 (1985)), cert. denied, 484 U.S. 1066, 108 S. Ct. 1029 (1988). *See also Lee v. Weisman,* 120 L. Ed. 2d 467, 112 S. Ct. 2649, 2658 (1992) ("There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

Appendix A

Americans United for Separation of Church and State v. City of Grand Rapids, 1992 U.S.App. LEXIS 29934, p. 25 (6th Cir. November 16, 1992).

Because of the extent to which school officials may and, in fact, do control student speech in the course of school activities, *Hazelwood School District, supra,* a student leading a public prayer in the course of a high school graduation ceremony is more likely to be perceived as representing the governmental endorsement of religion than an outside clergyman who is not subject to control by school officials. In the primary and secondary school context, religious activities as part of an official school activity will almost always be endorsements of religion because schools are not traditional fora for free speech and students are not, therefore, inclined to distinguish between messages compelled by school authorities and ones merely permitted by them.

Indeed, the only Supreme Court case approving religious activities in the context of the public schools, *Westside Community Schools v. Mergens,* 110 S.Ct. 2356 (1990), rests its analysis largely on the fact that the religious clubs whose recognition it compelled were wholly student initiated and run, met outside normal school hours, were not led or sponsored by school officials, and were organized in schools which already recognized other non-curricular clubs. Clear Lake High School's graduation ceremony, like that in *Lee* and most public school graduation exercises, are clearly full-blown school functions that cannot be mistaken for a private student club, or an open forum. *Lundberg v. West Monona Community School Dist., 731 F.Supp. 331 (W.D.Ia. 1989).*

Neither would it be particularly significant, if it were true[5],

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5. As the panel notes, at page 1021 of the slip opinion, the record does not (Cont'd)

that the senior class voted to have prayers in the graduation program. Any prayer included as part of the program of the official, governmentally sponsored and controlled graduation ceremony will be perceived by a reasonable observer as a governmental endorsement of religion and will therefore be unconstitutional. That conclusion is not changed by the fact that the school board has, at least formally, delegated its authority to decide what will be in the program to the senior class "with the advise and counsel of the senior class principal." It would require an abandonment of district control over the ceremony much greater than is indicated in this record before a reasonable observer could perceive these prayers as private and unofficial.

The fact that the *Lee* holding would not be different if the prayer had been led by a student instead of clergyman is additionally demonstrated by the Supreme Court's treatment of the Sixth Circuit's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), a case upholding graduation prayers delivered by a student volunteer. Both the majority and the dissent in the First Circuit's opinion in *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990) perceived *Stein* and *Weisman* as inconsistent, the Supreme Court apparently agreed and granted *certiorari* to resolve the conflict. *Lee, supra*, at 2655. Had the student prayer leader been enough to save graduation prayer, it seems likely that the Court would have explicitly distinguished *Stein* on that ground.

At the time of the original decision of this case, many

(Cont'd)
indicate how the "graduating senior class exercises its "discretion" to decide whether or not to have prayers in the graduation ceremony. In light of the fact that the school board resolution purports to be a codification of prior practice, it seems likely that the class does not vote, but that the class officers and valedictorians make the decision informally in consultation with the senior class principal.

observers anticipated that the Supreme Court would use *Lee v. Weisman* to repudiate the past thirty years of Establishment Clause jurisprudence. In fact, the Court used *Lee* to reaffirm its precedents and to hold that graduation prayers were unconstitutional. This Court is compelled by *stare decisis* to follow the holding of the Supreme Court and reverse the judgment of the district court.

II. THE SUPREME COURT'S DECISION IN *LEE V. WEISMAN* REQUIRES, AT LEAST, THAT THIS CASE BE REMANDED TO THE DISTRICT COURT SO THAT THE COURT MAY APPLY THE FACTS OF THIS CASE TO THE NEWLY ANNOUNCED LEGAL STANDARD.

In his original brief on appeal, Jones argued that the district court had erred in granting defendant's motion for summary judgment because he had been denied an opportunity to develop important factual issues when the court granted summary judgment based on the school district's eleventh hour adoption of a formal policy. Jones has always contended that there were material factual disputes which were relevant to the decision of this case and which precluded summary judgment. This argument is even stronger in the current posture of the case.

The panel opinion distinguishes this case from *Lee* on its facts, yet, not surprising, the facts in a five-year old summary judgment record that was created years before the applicable legal standard for graduation prayers was announced by the Supreme Court are somewhat sparse. The panel decided, in essence, that the involvement of the "senior class" in the decision to have prayers at graduation distinguishes this case from *Lee*, yet it admits that it does not know from the record how the senior class makes this decision. Assuming *arguendo* that some level of student decision-

making could distinguish this case from *Lee*, it might make a difference to the outcome of the case if during the five years since the adoption of the Resolution the decision to pray or not to pray (and who would conduct the prayer) has been made by school administrators in consultation with a small group of seniors (as had been done previously), as opposed to the decision being made in a democratic fashion. That fact is not in the record because at the time appellee moved for summary judgment the Resolution had never been carried out. Five Clear Lake High School graduations have taken place since the district filed its motion for summary judgment, and evidence as to how the Resolution works in practice is highly relevant to a just and legal resolution of this matter. The panel opinion based its decision on imagined facts when the actual facts are available on remand.

The panel opinion reveals another inappropriate reason for refusing to remand the case for a trial. In footnote 10 of the opinion, the Court states "We understand our present task to be limited to determination of the Resolution's facial constitutionality . . .". This understanding is mistaken. This lawsuit was not filed as a challenge to the facial constitutionality of the Resolution; it was and is an attack on the district's practice of permitting prayers during its graduation ceremony. Months after plaintiffs sued them, Clear Creek adopted the Resolution as a defense to the lawsuit and asserted its facial constitutionality as its sole grounds for summary judgment. Plaintiffs have always sought and continue to seek the opportunity to try their case and to prove that defendant's practice is violative of the Establishment Clause, whatever its formal policy may say.

Appendix A

CONCLUSION

Jones respectfully prays that the Court of Appeals, for the reasons set forth in this petition grant a rehearing *en banc*, and upon said hearing, reverse the judgment below and remand for trial.

Respectfully submitted,

/S/
Bruce V. Griffiths
1109 Congress, Suite 1150
Houston, Texas 77002-1702
Telephone: (713) 223-5817
Facsimile: (713) 223-5821

Mitchell A. Seider
3700 First City Tower
Houston, Texas 77002
(713) 658-8881
ATTORNEYS FOR
PLAINTIFFS-APPELLANTS

CERTIFICATE OF SERVICE

I, Bruce V. Griffiths, hereby certify that I have served true copies of the foregoing petition for rehearing *en banc* on counsel of record by mailing same this seventh day of December, 1992.

/S/
Bruce V. Griffiths

APPENDIX B — PER CURIAM OPINION DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2638

MERRITT E. JONES, on his behalf and as next friend of PAMELA JONES, a child, ET AL.,

Plaintiffs-Appellants,

versus

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(OPINION NOVEMBER 24, 1992 5 CIR., 19___, ____F.2d____)

(December 28, 1992)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on

rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/

United States Circuit Judge

Judge KING and Judge DeMOSS did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX C — CLEAR CREEK INDEPENDENT SCHOOL DISTRICT RESOLUTION

RESOLUTION

STATE OF TEXAS §
§
COUNTY OF GALVESTON §

WHEREAS, invocations and benedictions have been a ceremonial tradition at graduation exercises in this District since its inception, and at public school commencements, generally, since the beginning of public schools in this country; and

WHEREAS, invocations and benedictions at graduation exercises serve to solemnize the occasion, expressing confidence in the future, and encouraging recognition of what is worthy in our society; and

WHEREAS, a controversy now exists regarding the use of invocations and benedictions at high school graduation ceremonies and the practice of this District in connection therewith; and

WHEREAS, to the extent there may be any misunderstanding, it is in the best interests of the students, their parents and the District, for this Board to make the practice of the District clearly and expressly known;

NOW, THEREFORE, be it resolved by the Board of Trustees of Clear Creek Independent School District that:

1. The use of an invocation and/or benediction at high school graduation exercises shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

Appendix C

2. The invocation and benediction, if used, shall be given by a student volunteer; and,

3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

PASSED, APPROVED, AND ADOPTED this 15th day of December, 1987.

/s/
President, Board of Trustees

ATTEST:

/s/
Secretary, Board of Trustees